IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC.,

Appellants,

v.

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the final decree of the Superior Court of the State of Rhode Island entered on January 18, 1962. In accordance with Rhode Island practice,* that final decree was entered pursuant to the opinion of the Supreme Court of the State of Rhode Island. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal constitutional questions are presented.

* *Testa* v. *Katt*, 330 U. S. 386, 389 footnote 3 (1947).

Opinions Below

The opinion of Justice William M. Mackenzie of the Superior Court of the State of Rhode Island is not reported. A copy of that opinion is annexed hereto as Appendix A. The majority and dissenting opinions of the Supreme Court of the State of Rhode Island, four judges participating, are reported in 176 A. 2d 393. Copies of those opinions are annexed hereto as Appendix B.

Jurisdiction

In March 1960, Appellants, publishers of paperbound books distributed in Rhode Island, filed a petition to the Superior Court of the State of Rhode Island for a declaratory judgment pursuant to The Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956, as amended). In that petition Appellants prayed for judgment as follows:

A. Declaring that Resolution No. 73 (which created the Rhode Island Commission to Encourage Morality in Youth, of which Appellees are the members and executive secretary), as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island and

B. Declaring that the acts and practices of Appellees in purported performance of their duties as members of the Rhode Island Commission to Encourage Morality in Youth, as alleged in such petition, have violated and violate the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island and enjoining and restraining

Appellees, their agents, servants and employees from continuing those acts.

After a trial in the Superior Court of Rhode Island before Justice William M. Mackenzie, and the rendition by said Justice of his opinion (Appendix A) a decree was entered on March 2, 1961 in said Superior Court. A copy of said decree is annexed hereto as Exhibit C.

Said decree, to the extent here pertinent, reads as follows:

> "Wherefore, it is hereby Ordered, Adjudged and Decreed:
>
> 1. That Resolution No. 73, as amended, is constitutional.
>
> 2. That the acts of the Respondents [i.e. the Appellees] in disseminating said notices concerning books and publications are hereby declared unconstitutional.
>
> 3. That Respondents, and each of them, their agents, servants and employees and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers, that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of book lists or bulletins.
>
> 4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances."

Both sides appealed from the aforesaid decree to the Supreme Court of Rhode Island—Appellants from so much thereof as declared Resolution No. 73, as amended, to be constitutional and Appellees from the remainder thereof.

The Supreme Court of Rhode Island in its opinion on said appeal denied and dismissed Appellants' appeal, sustained Appellees' appeal to the extent of reversing Orders Nos. 2 and 3 hereinabove quoted and remanded the cause to the Superior Court for further proceedings for the purpose of entering a final decree in accordance with said opinion.

On January 18, 1962, the Superior Court of Rhode Island entered a final decree in accordance with and pursuant to the aforesaid opinion of the Supreme Court. A copy of said decree is annexed hereto as Appendix D.

The notice of appeal to the Supreme Court of the United States from such final decree was filed in the Superior Court of Rhode Island on March 16, 1962.

The statutory provision conferring on the Supreme Court of the United States jurisdiction of this appeal is Title 28, United States Code, Section 1257 (2).

The following decisions sustain the jurisdiction of this Court to review the decree on this appeal. *Smith* v. *California*, 361 U. S. 147 (1959); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Burstyn* v. *Wilson*, 343 U. S. 495 (1952); *Winters* v. *New York*, 333 U. S. 507 (1948).

Statute Involved

The statute here involved is Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly and approved April 26, 1956, as amended by S. 444 of the said General Assembly on May 25, 1959.

Resolution No. 73 (January Sessions Acts and Resolves 1956) reads as follows:

No. 73 H 1000—Approved *April 26, 1956*

RESOLUTION creating a commission to encourage morality in youth.

Resolved, That a commission be and it is hereby created, consisting of nine members to be appointed by the governor, one of whom he shall designate as chairman.

Forthwith upon the passage of this resolution, the governor shall appoint 1 member to serve until the 1st day of March, 1957, 1 member to serve until the 1st day of March, 1958, 1 member to serve until the 1st day of March, 1959, and 1 member to serve until the 1st day of March, 1960, and 1 member to serve until the 1st day of March, 1961. During the month of February, 1957, and annually thereafter, the governor shall appoint a member to serve for a term of five years commencing with the 1st day of March then next ensuing and until his successor has been appointed and qualified to succeed the member whose term will then next expire.

Vacancies on said commission shall be filled for the unexpired term of the member or members being succeeded.

Any member shall be eligible to succeed himself.

Forthwith upon the passage of this resolution the commission shall meet and organize.

It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined

in sections 13, 47, 48 and 49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections 13, 47, 48 and 49 of said chapter 610, as amended.*

Said commission may employ such assistants, experts, and other personnel as may be necessary in the proper exercise of its duties hereunder.

The members of said commission shall serve without compensation but shall be allowed their necessary and travel expenses, and shall report annually during the month of January to the governor and the general assembly as to their activities and findings; and be it further

Resolved, That the general assembly shall annually appropriate such sum as may be necessary, to carry out the purposes of this resolution; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated; and be it further

Resolved, That for the purpose of carrying out the provisions of this resolution for the period ending June 30, 1957, the sum of $10,000.00 be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated.

The said S. 444 (Resolution No. 95, Acts and Resolves 1959), amended the sixth paragraph of Resolution No. 73 to read as follows:

* This paragraph is the paragraph amended by S. 444 as set forth below.

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or, impure language, as set forth in Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and or treatment which would ameliorate or eliminate said causes."

Questions Presented

1. Does Resolution No. 73, adopted at the January, 1956 Session of the Rhode Island General Assembly and approved April 26, 1956, as amended by S. 444 of the said General Assembly on May 25, 1959, creating the Rhode Island Commission to Encourage Morality in Youth, tend to suppress or inhibit the circulation of books in Rhode Island in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Did the acts and practices of the Appellees, the members and executive secretary of The Rhode Island Commission to Encourage Morality in Youth, in purported compliance with the duties imposed upon them by the aforesaid Resolution No. 73, as amended, tend to suppress or inhibit the circulation of books in Rhode Island, and did they in fact suppress such circulation of books in Rhode Island, without judicial determination that books so suppressed are obscene, in violation of the First and Four-

teenth Amendments to the Constitution of the United States?

Statement

The Federal constitutional questions here sought to be reviewed were raised in the petition filed by Appellants in the Superior Court of Rhode Island as more particularly set forth hereinabove at p. 2. These issues were tried in the Superior Court and were again raised on the appeal to the Supreme Court of Rhode Island, as appears from the opinion of that Court (Appendix B). Thus, this appeal involves a final decree of the highest court of the State of Rhode Island sustaining the constitutionality of a Rhode Island statute and sustaining the constitutionality of the acts and practices of the Appellees charged with the administration of said statute, against Appellants' contentions that said statute and such acts and practices violated Appellants' rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The Facts

The uncontradicted facts material to the consideration of the questions presented, as established at the trial before Superior Court Justice Mackenzie are as follows:

Appellants are publishers of paper-bound books, which have been for many years and are now being distributed in Rhode Island (T.* p. 12, A. 10; p. 13, A. 12-13).

Appellees are members of the Rhode Island Commission to Encourage Morality in Youth (herein referred to as the "Commission"), except Appellee Albert McAloon, who is its executive secretary (T. p. 70, A. 68; T. p. 42, A. 3).

* "T" refers to the transcript of the minutes of the trial.

In May, 1959, the sixth paragraph of Resolution No. 73 was amended by S. 444 of the General Assembly to read as follows:

> "It shall be the duty of said commission to *educate the public concerning any book*, picture, pamphlet, ballad, printed paper or other thing *containing obscene, indecent or impure language*, as defined in Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows', and to investigate and recommend the *prosecution of all violations of said sections.* . . ." (Italics supplied.)

Max Silverstein & Sons (hereinafter referred to as "Silverstein"), of 2 Lancaster Street, Providence, for many years has been and is now the exclusive wholesale distributor for Appellants' books for about 70% to 75% of the State of Rhode Island, including all of Providence. As such wholesale distributor, Silverstein distributes Appellants' books to retailers (T. p. 11, A. 2-4; p. 12, A. 9; p. 14, A. 16).

Shortly after the Commission began to function, Silverstein received a notice on the official letterhead of the Commission dated July 19, 1957, reading in part, as follows:

> "This agency was established by legislative order in 1956 with the immediate charge to *prevent* the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.
>
> The Commissioners have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths under eighteen years of age.
>
> . . . . .
>
> *The Chiefs of Police have been given* the names of the aforementioned magazines with *the order*

that they are not to be sold, distributed or displayed to youths under eighteen years of age.

The Attorney General will act for us in cases of non-compliance.

The Commissioners trust that you will cooperate with this agency in their work. They fully realize the complexity of this problem but believe, in view of the need of strengthening our youths, improving family life and preventing un-social behavior, that the above-named publications are definitely objectionable under Chapter 610* of the general laws as amended.

Another list will follow shortly.

Thanking you for your anticipated *cooperation*, I am,

Sincerely yours,

ALBERT J. MCALOON
Executive Secretary"

(Pet.** Ex. 1) (Italics supplied)

Under date of August 5, 1957, Silverstein received another notice from the Commission on its official letterhead reading, in part, as follows:

"The Commissioners by majority vote have declared that the following three magazines are objectionable for 'sale, distribution for display' for youth under 18 years of age.

* * * * *

We appreciate your *cooperation* in regard to the first list. If you have questions regarding the aims or methods of our Commission I suggest that you contact me at the above address.

Looking forward to *continued cooperation*, I am,"

(Pet. Ex. 2) (Italics supplied.)

* Relating to obscene and objectionable publications, now Chapter 11-31.

** Appellants here.

Another undated notice received by Silverstein from the Commission (in 1958) reads as follows:

> "The Rhode Island Commission on Youth, unanimously established by the Rhode Island legislature in 1956, is pleased to offer you these enclosures, namely, the law on obscenity, the amendment creating this Commission, and a list of the most recent publications found objectionable for 'sale, distribution or display for youth under 18 years of age'.
>
> This list should be used as a guide in judging other similar publications not named.
>
> Your *cooperation* in *removing* the listed and other objectionable publications from your newsstands will be appreciated. *Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department.*" (Pet. Ex. 11) (Italics supplied)

Between August 1957 and February 1960 Silverstein received many other official notices from the Commission, each listing certain publications as having been found objectionable for "sale, distribution or display for youth under 18 years of age," each such notice ending either with "Thanking you for your past cooperation," or "Thank you for your cooperation," or "Thank you for your anticipated cooperation." (Pet. Exs. 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15)

An undated "News Letter" received by Silverstein from the Commission (Pet. Ex. 16) in or about December 1957 contains the following paragraph:

> "Your Commission has reviewed 38 publications. They have found by a majority vote 32 to be totally objectionable for youths under 18. *The lists have been sent to distributors and police departments. To the present cooperation has been gratifying.*" (Italics supplied)

Copies of each such notice were sent by Respondents to the Police Departments of the various cities and towns in Rhode Island (Pet. Ex. 1 and T. p. 47, A. 20).

Promptly after receipt from the Commission of each notice, Silverstein stopped selling the publications distributed by it which were listed on such notice and, in addition, instructed its field men to pick up all unsold copies from its retail customers. The unsold copies were then returned to the publishers (T. p. 25, A. 23; p. 26, A. 24-27). Silverstein took this action "rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply, * * *." (T. p. 26, A. 27) The testimony further shows, that it was for the same reason--the desire to avoid being involved in "a court proceeding" with a "duly authorized organization" that Silverstein agreed to "cooperate" with the Commission in its activities (T. p. 40, A. 66-67).

Shortly after the receipt from the Commission of such notices, Silverstein would be asked by a member of the Providence Police Department for a report of what had been done in connection with the publications listed on such notices. The police officer would ask information as to the number of copies originally received by Silverstein, the number that had been taken back from the retailers and the number that had been returned by Silverstein to the publishers (T. p. 26, A. 29; p. 27, A. 32; pp. 28-29, A. 34-35).

The Commission's Annual Report dated January 1960 contains the following statements:

> "Thirty magazine and paperback pocketbooks were added to the previous list of publications found objectionable for youth under 18 by a majority vote of the Commission. This brings the total to 108.

> *The guide lists* (requested by chiefs of police, distributors and educators in 1957) of the type of publications deemed objectionable for youth under 18 *is still sent to all local distributors and chiefs of police* in Rhode Island, with the result that in the last six months our newsstands show a very *improved condition.*
>
> In most cases local distributors have been cooperative this year, *withdrawing publications* of the type listed in the Commission guide list and *returning them to publishers.*
>
> This Commission feels that the guide list, *Court action initiated by this Commission*, and the cooperation of the Attorney General's Department is largely responsible for the 'new look' on Rhode Island newsstands." (Resp. Ex. A, pp. 2 and 3) (Italics supplied)

One Commission notice (Pet. Ex. 6) refers to the book PEYTON PLACE by Grace Metalious. The paper-bound edition of that book is published by Appellant Dell Publishing Company, Inc. (T. p. 14, A. 17). Another Commission notice (Pet. Ex. 14) refers to the book THE BRAMBLE BUSH by Charles Mergendahl. The paper bound edition of that book is published by Appellant Bantam Books, Inc. (T. p 14, A. 18).

The Federal Questions Here Presented are Substantial

We submit that upon basic decided principles the conclusion is inescapable that Resolution No. 73, as amended by S. 444, and the acts and practices of Appellees in purported compliance with their duties under said statute violate freedom of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Since *Near* v. *Minnesota* 283 U. S. 697 (1931), it has been settled doctrine that by virtue of the Fourteenth Amendment liberty of the press and speech is safeguarded from invasion by state action. *Smith* v. *California* 361 U. S. 147, 150 (1959).

The dissemination of books is an integral part of freedom of the press. As was aptly stated by this Court in *Smith* v. *California*, *supra*, at p. 150:

> "And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes places under commercial auspices. (cases cited). Certainly a retail book seller plays a most significant role in the process of the distribution of books."

While it is true that under *Roth* v. *United States*, 354 U. S. 476 (1957), obscene publications are not protected by the First Amendment, it is equally true that there is no "state power to restrict the dissemination of books which are not obscene." (*Smith* v. *California*, *supra*, p. 152)

Furthermore, "* * * the question whether a particular work is of that character (i.e., obscene) involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." *Roth* v. *United States*, 354 U. S. 476, 497-498 (1957) (Harlan, J., concurring). See also *Feiner* v. *New York*, 340 U. S. 315, 316 (1951); *Watts* v. *Indiana*, 338 U. S. 49, 51 (1949); *Norris* v. *Alabama*, 294 U. S. 587, 589-590 (1935); *People* v. *Richmond County News*, 9 N. Y. 2d 578, 580 (1961).

Such a "sensitive and delicate" judgment is one that must be made by the courts in accordance with the requirements of due process of law. *Grove Press, Inc.* v. *Christenberry*, 175 F. Supp. 488, 495 (1959), affirmed 276 F. 2d 433 (2 Cir. 1960); *Roth* v. *United States*, *supra*, pp. 488-489; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441, 443 (1957).

It follows, therefore, that no state possesses the power to suppress or limit the circulation of any book until *there has first been a determination by a court* of competent jurisdiction, in accordance with the requirement of due process, *that such book is obscene* within the definition laid down in *Roth v. United States, supra.*

This was well expressed in *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 834 (1953), where the District Court stated:

> "Until a court of competent jurisdiction adjudges a work to be obscene * * *, there would exist no warrant in law for its suppression."

It further follows that any censorship method devised by a state which results in the suppression or limitation of the circulation of any book prior to such a judicial determination that such book is obscene, violates the constitutional right of the publisher, the bookseller and the public in general.

In point of fact, wherever any such method of censorship has been devised by any state or state agency, based upon implied threats of criminal prosecution, such method has been struck down by the courts. *Sunshine Book Co. v. McCaffrey*, 4 App. Div. (2d) 643, 647 (N. Y. 1957); *Bantam Books, Inc. v. Melko*, 25 N. J. Superior 292 (1953), modified 14 N. J. 524 (1953); *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (1953); *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 482 (1921); *H.M.H. Publishing Co. v. Garrett*, 151 F. Supp. 903 (1957); *Random House, Inc. v. City of Detroit, et al.*, unreported, File No. 555 684, Cir. Ct. Wayne County, Mich. (March 29, 1957 on preliminary injunction; June 16, 1958 on permanent injunction). A copy of the opinion on the preliminary injunction is annexed hereto as Appendix E.

Illustrative of the last cited authorities is *Sunshine Book Co.* v. *McCaffrey, supra.* In that case, the defendant, the License Commissioner of New York City, had issued a letter to all licensed newsdealers threatening to institute proceedings to revoke or suspend the licenses of those dealers who did not discontinue the sale of certain magazines listed in his letter. The basis for the Commissioner's letter was the alleged obscenity of the listed magazines. Plaintiff in that case was the publisher of several of the magazines.

The Appellate Division of the New York Supreme Court reversed the lower court and granted an injunction directing the License Commissioner to recall his letter and to instruct the newsdealers to disregard it. In the course of its opinion the Court said at page 647:

> "Even as we would not hesitate to strike down a palpable attempt to violate those guarantees [freedom of speech and press], so, by the same token, are we constantly vigilant against any indirect encroachments, however subtle, which result in censorship. Courts have condemned informal methods of censorship which were attempted by threats of criminal prosecution (Bantam Books *v.* Melko, 25 N. J. Super. 292, mod. 14 N. J. 524; New Amer. Lib. *v.* Allen, 114 F. Supp. 823; Dearborn Pub. Co. *v.* Fitzgerald, 271 F. 479, 482)."
>
> • • • • • •
>
> "The existing statutes afford means to law enforcement officials for dealing with obscene literature and publications. New methods which meet constitutional standards may be devised in the future by the Legislature. We cannot predict what forms these may take. The human mind is fertile and necessity promotes ingenuity. *But whatever means may be taken to stamp out the pernicious evil of obscenity, they must conform with, and respect, the constitutional guarantees of free speech and*

> *freedom of the press. We cannot countenance encroachments upon those rights by censorship by an administrative official.* To permit that would be to inject the unwholesome effects which the uncompromising rule against prior restraint was calculated to prevent." (pp. 648-649) (Italics supplied)

In derogation of the aforesaid fundamental principles, the uncontradicted facts established at the trial herein show that the effect of the adoption of Resolution No. 73, as amended, and of the activities engaged in by the Commission in purported compliance with its duties under that Resolution has been to suppress the circulation of books in Rhode Island *without any judicial determination* as to the obscenity of these books.

Resolution No. 73, as amended, states that it shall be the duty of the Commission "to educate the public concerning any book * * * containing obscene, indecent or impure language, * * * and to investigate and recommend the prosecution of all violations of said sections, * * *."

Any such "education" of the public by the Commission concerning any book containing obscene language, whether by advice, information, list, notice or otherwise, by the very language of Resolution No. 73, as amended, constitutes an implicit threat that unless there is cessation of sale by wholesale distributors and retail booksellers of that book, the said wholesale distributors and retail booksellers would be prosecuted criminally.

Such threat results from the fact that, pursuant to Resolution No. 73, as amended, the Commission's duty to "educate the public" concerning any "book * * * containing obscene, indecent or impure language" is implemented by the duty conferred upon the Commission by the Resolution to recommend prosecution of the wholesale distributors and retail booksellers for alleged violation of Chapter

11-31 of the General Laws of Rhode Island entitled "Obscene and objectionable publications and shows", which, among other things, makes it a criminal offense for any person to import, print, publish, sell, lend, give away, advertise for sale, or distribute any "book * * * containing obscene, indecent or impure language".

With respect to the constitutionality of Resolution No. 73, Judge Mackenzie had this to say:

> "It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The Resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal prosecution, the inevitable result is the suppression of books without a judicial determination as to whether or not they are obscene. *The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island.*" (Italics supplied) (Appendix A, pp. 33-34)

The Commission made explicit the implicit threat of prosecution conveyed by Resolution No. 73, by the notices which it sent to distributors. Thus, in its notice of July 19, 1957 (Pet. Ex. 1) the Commission stated:

> "The Chiefs of Police have been given the names of the aforementioned magazines with the *order* that they are not to be sold, distributed or displayed to youths under eighteen years of age.
>
> *The Attorney General will act for us in cases of non-compliance.*" (Italics supplied.)

In Petitioners' Exhibit 11, an undated notice sent by the Commission in 1958 the following statement is contained:

> *"Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."*

In addition, as the numerous exhibits establish, and as was testified upon the trial by Appellee McAloon, copies of the various notices issued by the Commission were sent to the Chiefs of Police throughout Rhode Island. In fact, the witness Kaplan (Silverstein's manager) testified that shortly after the receipt of each such notice from the Commission, a request was received from a member of the Providence Police Department for a report as to what Silverstein had done with respect to publications distributed by it listed on such notice. (T. p. 27, A. 32)

Under these circumstances, to contend as Appellees did upon the trial, that the stopping of sale of the publications listed in the Commission's notices was "voluntary" on the part of the distributors, is merely engaging in semantics. Particularly is this so in the light of the testimony of Mr. Kaplan that Silverstein, upon receipt of each notice, stopped selling the publications distributed by it listed on such notice and instructed its field men to recall all unsold copies from retail customers because of Silverstein's desire to avoid "the possibility of some sort of a court action against ourselves, as well as the people that we supply." (T. p. 25, A. 23; p. 26, A. 24-27)

Superior Court Justice Mackenzie, in rejecting this defense, made the following comments:

> "To say that the action taken by the distributors was voluntary is unrealistic. Here we have notices sent out on letterheads entitled RHODE ISLAND COMMISSION ON YOUTH informing the distributor that

this official, public agency, established by legislative order in 1956' (Petitioners' Exhibit "1") had made a finding that certain books and magazines being sold and delivered by the distributors were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.

'The Chiefs of Police have been given the names of the aforementioned magazines *with the order* that they are not to be sold. *.* *.' (Petitioners' Exhibit 1) (italics by the Court)

Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of various cities and towns. Yet the respondent McAloon would have us believe that the books and magazines were not 'banned' by the Commission, and that the distributors voluntarily cooperated with the Commission. *The effect of the notices sent out by the Commission was clearly intimidation.*" (Italics supplied) (Appendix A, p. 30)

In reversing Justice Mackenzie the Supreme Court of Rhode Island, in the majority opinion, said,

"We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated.

Unless and until such publication is judicially determined to be obscene the distributor may with

> impunity refuse to respond to any suggestions of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed, each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney general. Any unofficial group may do as much in this respect as the commission." (Appendix B, pp. 39-40)

We submit that the rationale of the Rhode Island Supreme Court completely ignores the realities of the situation. Whether or not the Commission had the legal power to order prosecution is not material. What is material, we submit, is that the Resolution itself, conferring upon Appellees the statutory power to recommend prosecution under the obscenity laws, has the tendency, and, in fact, has had the actual effect, of inhibiting the circulation of books without prior judicial determination that such books are obscene.

Nor is there any validity to the Rhode Island's Supreme Court's statement that "Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission" (Appendix B, p. 40) or its further statement, "He was free to disregard their request for cooperation and if he did so he had nothing to fear except prosecution for violating G.L. 1956, chap. 11-31." (Appendix B, p. 42)

A complete answer to this argument was given by the Court in *American Mercury, Inc.* v. *Chase*, 13 F. (2d) 224, 225 (1926), as follows:

> "Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would

> prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

We submit that as a result of Resolution No. 73, as amended, and the activities of Appellees thereunder, Appellants Bantam Books, Inc. and Dell Publishing Company, Inc. have been denied the right to circulate certain books published by them, and all Appellants are constantly subject to the threat of being deprived of their right to circulate books in Rhode Island. In addition, the public of Rhode Island has been deprived of the right to read certain books and, so long as Resolution No. 73 remains in effect, is constantly subject to deprivation of the freedom to read. Such deprivation has been accomplished and is threatened to be accomplished without any prior judicial determination that the books involved are obscene. Rather the determination takes the form of a pre-judgment by the Appellees—in most cases by a majority—based upon unknown standards.

We submit, that what was said by this Court in *Smith* v. *California, supra*, with respect to another statute, is here equally applicable. This Court there said at page 154:

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

And at page 155:

> "It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

CONCLUSION

For the reasons hereinabove set forth we urge this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

Opinion of Superior Court of Rhode Island

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

M.P. No. 5139

BANTAM BOOKS, INC., ET ALS

vs.

JOSEPH A. SULLIVAN, ET AL, IN THEIR CAPACITIES AS MEMBERS OF THE RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH, ET AL

DECISION

MACKENZIE, J. This is a petition which has been brought under the Uniform Declaratory Judgments Act (*Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956,* as amended). The petitioners are four New York corporations; they are publishers of paper bound books which are and have been for a long period of time distributed in the State of Rhode Island. The respondents are the present members and the executive secretary of the Rhode Island Commission to Encourage Morality in Youth, hereinafter sometimes referred to as the Commission. The said Commission was created pursuant to *Resolution No. 73* adopted at the January, 1956, Session of the Rhode Island General Assembly and approved April 26, 1956. The said Resolution was amended by S. 444 of the General Assembly on May 25, 1959.

The said S. 444 amended the sixth paragraph of Resolution No. 73 to read as follows:

Appendix A

> "It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and or treatment which would ameliorate or eliminate said causes."

There appears to be little dispute as to the facts in this case. About a year after the Commission was created in 1956 it sent notices to various book and magazine distributors, including Max Silverstein & Sons (hereinafter sometimes referred to as "Silverstein") of 344 Water Street, Providence, who at the time was and for a long time had been the distributor in the Providence area for the petitioners. Several of the notices which Silverstein received from the Commission were introduced into evidence (Petitioners' Exhibits "1" to "16", inclusive). The notices informed Silverstein that certain books and magazines, listed therein and distributed by him, had been reviewed by the Commission and that by majority vote the Commission had declared them to be objectionable for sale, distribution or display for youths under eighteen years of age. The first of the notices (Petitioners' Exhibit "1") also contained the following language:

> "The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.
>
> "The Attorney General will act for us in cases of non-compliance.
>
> "The Commissioners trust that you will cooperate with this agency in their work. * * *"

Another notice received by Silverstein from the Commission included the following language:

> "Your cooperation in removing the listed and other objectionable publications from your newsstands will be appreciated. Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department" (Petitioners' Exhibit "11").

Petitioners' Exhibit "6" is a notice received by Silverstein from the Commission with reference to *Peyton Place*, a paper bound book published by one of the petitioners, and Petitioners' Exhibit "14" is a similar notice with reference to *The Bramble Bush*, a paper bound book published by another of the petitioners.

Joel Kaplan, manager of Silverstein & Sons, testified that after receiving each notice from the Commission his company accepted no more orders for the publications listed, stopped selling the copies it had, and instructed its men to pick up all unsold copies from its retail customers. The unsold copies were then all returned to the publishers. The witness testified that his company did all this rather than face court action. In cross-examination the witness testified that he had attended a meeting which had been called by the Commission, at which meeting he said his

company agreed to cooperate with the Commission. On re-direct examination he stated that he had agreed to cooperate with the Commission because the Commission was duly authorized under law and they did not want to be involved in any litigation, or words to that effect.

He also testified that shortly after his company received each notice it would be visited by a member of the Providence Police Department who wanted a report on what action Silverstein had taken as to the books and magazines listed in that notice. The police officer wanted the number of copies originally received from the publisher, the number that had been reclaimed from the retailers and the number that had been returned by Silverstein to the publishers. (See pencilled notations on Petitioners' Exhibit "7").

The petitioners contend that said *Resolution 73*, as amended, and also the action taken by the members of the Commission are unconstitutional because they are in violation of the provisions guaranteeing freedom of the press. (First Amendment, Constitution of the United States; Section 1 of the Fourteenth Amendment, Constitution of the United States; Article 1, Section 20, Constitution of Rhode Island.) The petitioners concede that the constitutional guarantee of freedom of the press does not extend to obscene publications.

Roth v. United States, 354 U. S. 476 (1957)

They do maintain, however, that since the suppression of a publication which is not obscene would be a violation of the constitutional guarantees, the determination of whether such publication is or is not obscene is one which must be made by the courts in accordance with due process

of law, and not one which may be made by the respondent Commissioners.

The problem of obscenity and how best to deal with it is one which has been with us for a very long time and to which many people have devoted a great amount of study. There have been numerous instances over the years of persons who have become extremely zealous in their attempts to stamp out what they considered obscenity in one form or another. To spell out the names of a number of books which have been the recent subjects of litigation in this field would merely give additional publicity to the type of literature which some of the respondent Commissioners consider obscene. Suffice it to say that even after court trials there is often no uniformity as to what is obscenity. The novel "*Memoirs of Hecate County*" was found to be obscene in New York.

> *Doubleday & Co., Inc. v. New York*, 335 U. S. 848 (1948)

Yet a bookseller indicted for selling the same book was acquitted in California. The book "*God's Little Acre*" was held to be obscene in Massachusetts, but not obscene in New York and Pennsylvania.

The mere fact that the problem of obscenity is with us does not mean, however, that we should disregard our constitutional safeguards. Obscenity is not on trial in the case before us. What is at issue is the Resolution which created the Commission and the actions which have been taken by the respondents in carrying out their purpose.

Mr. Chief Justice Warren, in his concurring opinion in the *Roth* case, *supra*, said:

> "That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight states as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem."

Roth v. United States, 354 U. S. 476, 495 (1957)

The respondents take the position here that they have not "banned" any of the books and magazines listed, that they have merely "advised" the distributors and dealers, and that the withdrawal of the books and magazines from circulation has been done voluntarily by Silverstein and the other distributors and dealers. The respondent McAloon testified in cross-examination that after the Commission sent out its notices that certain publications were objectionable it "took no official concerted action" to follow up to see what steps the distributors took. Yet, we have the undisputed evidence that copies of all notices were sent to the chiefs of police, the uncontradicted testimony of the witness Kaplan that he was visited regularly by a representative of the Providence Police a few days after the receipt of each notice to find out what action he had taken, and we have the statement in the Commission's Report of 1960 to the Governor and the General Assembly, stating in part:

> "In most cases local distributors have been cooperative this year, withdrawing publications of the type listed in the Commission guide list *and returning them to publishers.*" (Underscoring by the Court.)

All of this is inconsistent with the testimony of Mr. McAloon that the Commission did nothing to find out what the distributors did after they received the notices.

To say that the action taken by the distributors was voluntary is unrealistic. Here we have notices sent out on letterheads entitled RHODE ISLAND COMMISSION ON YOUTH informing the distributor that this official, public agency, "established by legislative order in 1956" (Petitioners' Exhibit "1") had made a finding that certain books and magazines being sold and delivered by the distributor were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.

> "The Chiefs of Police have been given the names of the aforementioned magazines *with the order that* they are not to be sold. * * *" (Petitioners' Exhibit "1") (Underscoring by the Court.)

Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of the various cities and towns. Yet the respondent McAloon would have us believe that the books and magazines were not "banned" by the Commission, and that the distributors voluntarily cooperated with the Commission. The effect of the notices sent out by the Commission was clearly intimidation. The witness Kaplan testified that Silverstein, upon receiving the notices from the Commission, immediately did four things: (1) refused to take any new orders for the proscribed publications; (2) ceased selling any of the copies on hand; (3) withdrew from the retailers all unsold copies; and (4) returned all unsold copies to the publishers. He stated that this was all done because they did not want to become involved in litigation. His testimony was clear and convincing.

Petitioners' Exhibit "1" also states:

> "The Attorney General will act for us in cases of non-compliance."

What can these words possibly mean to the distributor? They can only mean:

> "If you fail to comply with this letter by removing from circulation those magazines or books listed herein, you will be prosecuted by the Attorney General."

This Court can find no other reasonable interpretation of that language.

Language in other notices (e.g. Petitioners' Exhibit "11") carries the same threat in the following language:

> "* * * Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."

As another Court said in a similar case:

> "Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."
>
> *American Mercury, Inc.* v. *Chase, et al.* 13 Fed. (2) 224, 225 (1926)

In another case we find the following language:

> "Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive • • •. True, as the prosecutor says by way of defense, there was no actual compulsion or threat in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received."
>
> *Bantam Books, Inc.* v. *Melko*, 25 N. J. Superior 292 (1953); modified in 14 N. J. 524 (1953)

There is no question but that the activities of the respondents have resulted in the suppression of the sale and circulation of books without any judicial determination as to whether or not they are obscene. The sending of these notices with their implicit threats of criminal prosecution are clear violations of the constitutional provisions guaranteeing freedom of the press.

Contrary to the contention of the respondents in their brief, the petitioners here are not seeking an injunction so as to furnish them with "unlimited license to publish and distribute obscene publications in this State." The petitioners desire freedom to publish, as guaranteed to them by the above-cited sections of the constitutions of the

United States and Rhode Island, knowing full well the consequences of their acts if they violate the criminal laws by the publication of obscene books and periodicals.

Let us examine the sixth paragraph of *Resolution No. 73*, as amended, to find out the duties of this Commission. The substance of that paragraph is:

> "It shall be the duty of said Commission to educate the public concerning any book, * * * containing obscene, * * * language, as defined in Chapter 11-31 * * *, and to investigate and recommend the prosecution of all violations of said sections, * * *"

Is it possible that even though the actions of the Commission have been violations of the constitutional guarantees, the Resolution itself may be valid? Can there be such "education" of the public without the accompanying implicit threat of criminal prosecution to the distributors and book sellers who refuse to accept the rulings of the commission?

The duty of the Commission is to "educate the public" concerning books containing obscene language and "to investigate and recommend the prosecution of all violations".

It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The Resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal prosecution, the inevitable result is the suppression of books without a judicial determination as to

whether or not they are obscene. The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island.

Is the fact that a member of this Court is in "considerable doubt as to the constitutionality" of the Resolution sufficient to declare the Resolution unconstitutional? The question of the constitutionality of a legislative act does not depend upon events which transpire after the adoption of the said act.

> *The Narragansett Electric Lighting Company* vs. *Sabre, et al.* 50 R. I. 288, 303 (1929)

In the same case, our Supreme Court said:

> "• • • We have frequently stated that one who attacks the constitutionality of an act of the Legislature has the burden of satisfying the court beyond a reasonable doubt that the act is invalid."
>
> *The Narragansett Electric Lighting Company* vs. *Sabre, et al.* supra, at page 298

There is no question but that the Superior Court may either certify constitutional questions to the Supreme Court or may determine them in the first instance.

> *Haigh et al* vs. *State Board of Hairdressing, et al.* 74 R. I. 106 (1948)

Our Supreme Court in *Allen* vs. *Rhode Island State Board of Veterinarians et al.* 72 R. I. 372 (1947), stated at page 377:

"* * * As a result of such method of amendment we point out, among other things, that a question concerning the constitutionality of a statute may now be determined, in the first instance at least, by any one of the eleven justices of the superior court and by every justice, assistant justice or clerk authorized to act as a justice of any one of the twelve district courts; that the determination of such question by one of those courts is not binding on the other, so that contrary conclusions on the same question might well be reached; that, in different cases raising the same question, different justices of the same court might decide the question in conflict with each other; and that, subject to the provisions of 16, as amended, unless a case involving a question of the constitutionality of a statute were brought to this court by appellate proceedings, the determination of such question by the superior or district courts would stand only for the case in which it was made and therefore would not bind all the people of this state."

The Supreme Court of New Jersey has wisely stated:

"* * * the better practice is for the inferior court to assume that an act is constitutional until it has been passed upon by the appellate court, unless it is so clearly in contravention of the constitution that there can be no reasonable doubt about it, which does not apply to the statute under consideration."

Legg vs. *Passaic County*, 122 N.J.L. 100; 4 A. 2d 300 (1939)

In view of the above, it appears to this Court that it would be better practice to leave the matter of passing

upon the constitutionality of *Resolution No. 73* as amended, to our Supreme Court.

The petitioners' petition for a declaratory judgment is granted. A decree may be presented (1) declaring constitutional *Resolution No. 73* as amended; (2) declaring unconstitutional the acts of the respondents in disseminating the above-described notices, their being in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article 1, Section 20, of the Constitution of Rhode Island; (3) permanently enjoining the respondents from continuing the dissemination of such notices.

APPENDIX B

Opinion of Supreme Court of Rhode Island

CONDON, C. J. This is a petition to the superior court for a declaratory judgment under G. L. 1956, chap. 9-30, otherwise known as the uniform declaratory judgments act. The cause is here on the petitioners' appeal from a decree denying a portion of the relief prayed for, and also on the respondents' appeal from such decree granting the petitioners certain other relief which they sought.

The petitioners are Bantam Books, Inc., Dell Publishing Company, Inc., Pocket Books, Inc. and The New American Library of World Literature, Inc., all New York corporations engaged in the business of publishing paper-bound books but not in distributing them in this state. The respondents are the executive secretary and members of the Rhode Island Commission to Encourage Morality in Youth. The commission was created by the general assembly at its January 1956 session by resolution No. 73. The resolution was amended on May 25, 1959 and as amended it charges the commission as follows:

> "It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes

and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

In the discharge of such duty as they construed it the commission compiled several lists of publications which upon investigation they deemed "completely objectionable for sale, distribution or display for youths under eighteen years of age" and notified distributors doing business within the state thereof. They also advised these distributors that the lists had been furnished to the police departments throughout the state. They asked for the cooperation of the distributors in removing the objectionable publications and stated that the receipt of such cooperation would eliminate the necessity of the commission recommending prosecution to the attorney general. As a result of such notices the distributor for Bantam Books, Inc. and Dell Publishing Company, Inc. returned a supply of certain paper-bound books published by them and stated the books could not be held for sale because they were listed by the commission as objectionable. The distributor did not object to the commission's action and is not a party to the instant proceedings.

In their petition, petitioners alleged that Resolution No. 73 is an unconstitutional interference with the right of freedom of the press guaranteed by the first amendment to the federal constitution and made applicable to the states by the fourteenth amendment. They also alleged that it is violative of article I, sec. 20, of the constitution of this state guaranteeing such freedom. The petitioners further alleged that as construed by the commission the resolution was unconstitutionally applied by them, that their actions thereunder should be declared null and void.

and that they should be enjoined from continuing such acts.

The cause was heard by a justice of the superior court without a jury on petition, answer and oral proof as though it were a suit in equity. At the conclusion of the evidence the trial justice decreed (1) that the resolution was constitutional, but (2) that the acts of respondents under their construction of it were unconstitutional in that they were in effect prior restraints of freedom of the press. On that ground they were (3) expressly enjoined by the decree from continuing such acts.

The petitioners contend that the trial justice erred in sustaining the constitutionality of the resolution. In support of such contention they argue that the same reasons upon which he based his finding that the commission's acts were unlawful were equally applicable to the resolution itself. On the other hand respondents, under their appeal, contend that their acts were in accordance with the authority vested in them by the resolution and that since the trial justice could not find it unconstitutional he erred in enjoining them from continuing such acts thereunder.

We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated.

Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney general. Any unofficial group may do as much in this respect as the commission.

As we view this resolution it does no more than clothe a designated group of individuals with an official status but with little if any more power than to investigate and recommend action by the appropriate authorities where its investigation indicates action is necessary. As such it may well be considered an arm of the legislature to effectuate its policy of preventing the dissemination of obscene literature and conceivably also in the nature of a bureau of investigation in aid of the police and the department of the attorney general in their detection and prosecution of violators of "chapter 11-31 of the general laws."

No case has been cited to us and we are aware of none wherein a similar resolution has been involved and its constitutionality questioned. While the United States supreme court has considered a number of cases involving various forms of state interference with freedom of the press, some of which have been cited by petitioners, none of them was concerned with a provision like resolution No. 73. *Smith* v. *California*, 361 U. S. 147; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436; *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Lovell* v. *City of Griffin*,

303 U. S. 444; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697. From our examination of those cases we are of the opinion that the supreme court would not deem such a provision violative of the first amendment as a previous restraint of freedom of the press. In any event unless and until the supreme court so rules we hold that the trial justice did not err in deciding that the resolution was constitutional.

We now come to the question whether he erred in holding that the commission in applying the resolution acted unconstitutionally. The petitioners argue that he did not, and they cite the following cases in support of his decision. *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479; *American Mercury, Inc. v. Chase*, 13 F. 2d 224; *Busey v. District of Columbia*, 138 F. 2d 592; *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823; *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488; *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903; *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292.

None of those cases is by a court of last resort. In each instance the decision is by a single judge of a court of inferior jurisdiction. However, we have nevertheless examined them, not because they have any standing as precedents but solely because of the possibility that the reasoning upon which the court based its decision might help in solving our problem. On examination we find that they are of no assistance. Most of such cases did not present a factual situation like the one in the instant case. In others where the facts were somewhat analogous the reasoning that led the judge to find prior restraint of freedom of the press is not, in our opinion, convincing. Moreover, in most of those cases the judge predicated such findings

on some unlawful action causing or threatening to cause irreparable injury to the complainant's property.

In the case at bar the evidence discloses no unlawful act on the part of the commission. On the contrary, their acts were in accord with the clearly expressed objectives of the resolution. They were only seeking and received the voluntary cooperation of petitioners' distributor. He was free to disregard their request for cooperation and if he did so he had nothing to fear except prosecution for violating G. L. 1956, chap. 11-31. And even such fear would be groundless if the books in question were not obscene.

It is no justification for petitioners to argue as they do that because the local distributor will not want to oppose the commission such a practice has the inevitable result of suppression of their books by censorship. Enforcement of the law against obscenity is not easy. It is hedged about by constitutional safeguards which in appropriate instances have been strictly applied. But the United States supreme court has repeatedly held that obscenity is not protected by the guaranties of the first amendment. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Roth* v. *United States*, 354 U. S. 476. However, that court has also held that the local distributor or bookseller cannot be convicted of such an offense unless the state proves that he had knowledge of the obscene nature of the book. *Smith* v. *California*, 361 U. S. 147.

Ordinarily a distributor or bookseller is not expected to know the character of all the books he distributes. It is only fair that he should be given some advance notice of which he may avail himself, if he chooses, before criminal proceedings are commenced against him. It is in that con

text we interpret the action of the commission here and the willing response thereto of the distributor. Of course the publisher would much prefer to have the distributor stand his ground and refuse to cooperate regardless of the consequences to him.

The status of the publisher, however, is vastly different from that of the distributor. He may not plead lack of notice. It is his business to know what he is publishing. If his publication on the bookseller's shelf is obscene, he is the real offender and it is his offense which resolution No. 73 seeks to discover and prosecute. But more often than not the publisher is beyond reach of the local law and in effect hides behind the unoffending local distributor.

When, as in the case at bar, steps are taken to save the local distributor from embroilment in criminal proceeding the petitioning publishers come forward protesting that the commission is depriving them of their constitutional right of freedom of the press. Their success in a number of jurisdictions in invoking the injunctive remedy has apparently encouraged them to invoke it here in the hope of thwarting the implementation by the commission of resolution No. 73. They rely heavily on the above-cited cases where such successes have been achieved.

However, in the instant case we are of the opinion that they are not aggrieved by any deprivation of their constitutional right to distribute their books in this state. Resolution No. 73 does not by its terms nor by the commission's acts under it prevent them from doing so. Unless their books are obscene they have nothing to fear. But if they are deemed to be obscene by the prosecuting authority of the state they cannot use the injunctive remedy of equity to prevent the state from bringing them to the bar of justice by appropriate criminal proceedings. In such pro

ceedings they will have a full, fair and impartial judicial determination of the issue of obscenity.

Obscenity is entitled to no special protection under either the state or federal constitution. In *Chaplinsky v. New Hampshire*, 315 U. S. 568, the supreme court of the United States unanimously declared that lewd and obscene speech raises no constitutional question. At page 572 it said, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

It is the social interest in order and morality that the legislature by enacting resolution No. 73 is seeking to subserve. And the acts of the commission thereunder were in our opinion a reasonable and lawful implementation of the resolution. To tie their hands by the injunction under consideration here would be to render them impotent to discharge the duties that the general assembly has specifically charged them to perform. We are therefore of the opinion that the trial justice erred in decreeing that their actions were unconstitutional and in enjoining them from so acting henceforth.

Before concluding opinion we should comment on *Sunshine Book Co. v. McCaffrey*, 4 App. Div. 2d (N. Y.) 643, upon which petitioners have also relied. Although that case is not by a court of last resort it does come from a court of appeal having a very large measure of revisory jurisdiction and for such reason its decisions stand on a higher plane of authority than those hereinbefore commented upon. However, we do not think the cited case helps the petitioners since it appears to be based on a factual situation not at all like the one here.

In that case a license commissioner threatened a licensed newsdealer with revocation of his license if he did not remove certain copies of a magazine from his newsstand. In the instant case no license is involved and the commission neither had any regulatory authority over the distributor nor attempted to exercise any such authority. And in the cited case the license commissioner was not acting pursuant to the provisions of a legislative act, imposing upon him specifically the duty of investigating obscene literature and recommending prosecution of violators of the statute law against obscenity. In any event even though the case may impliedly stand for more than it expressly decides we are not persuaded to accept it as authority in the special circumstances here.

The petitioners' appeal is denied and dismissed, the respondents' appeal is sustained in part, the decree appealed from is reversed as to order Nos. 2 and 3, otherwise it is affirmed, and the cause is remanded to the superior court for further proceedings.

ROBERTS, J., dissenting. I concur in the opinion of the majority that resolution No. 73, as amended, is not in its terms repugnant to the guaranties of the first amendment. The legislature has therein provided for an appropriation for the support of a program of public education concerning the deleterious influence of the publication of obscene, lewd, or indecent periodicals on the morals and welfare of youth and for appointment by the Governor of the members of a commission charged with the duty of conducting that program. I perceive no provision therein which would warrant concluding that the legislature contemplated that the commissioners was being authorized to act to engage in conduct other than that incidental to the program.

I am not fully persuaded that legislation providing for the dissemination of information relating to a matter of substantial public concern constitutes state action within the purview of the inhibitions of the pertinent constitutional provisions. The commission, as it is therein established, is without authority either to regulate the business that is the subject of the legislation or to accomplish any control over that business through the imposition of sanctions. An exercise of the duties imposed upon the commission therein does not impinge upon any right protected by the first amendment.

However, I am unable to concur in the conclusion of the majority concerning the propriety of the injunctive relief decreed by the trial justice. The respondents here, whatever might be their rights as individuals, may act legally in their capacities as members of the commission only within the authority conferred upon the commission by the resolution. It appears from the record that the commission, or certain of its officers acting in its behalf, has engaged in conduct that is clearly in excess of the authority conferred upon it by the resolution. Such action, to the extent that it exceeds the authority conferred, is illegal and may, upon a showing of the requisite equitable grounds, be enjoined.

The action upon which this finding of illegality is predicated relates to the circulation of notices to dealers in books and publications wherein the commission identifies certain books that it deems to be objectionable for sale or distribution for use by youths under the age of eighteen. The circulation of these notices, standing alone, was in my opinion action pursuant to the dissemination of information contemplated in the resolution. There is, how-

ever, further evidence tending to establish that the circulation of this information was implemented at the commission's instigation by a police surveillance of the stocks in the possession of these dealers which caused certain of them to withdraw the books so identified from sale generally. Of this the trial justice said: "The sending of these notices with their implicit threats of criminal prosecution are clear violations of the constitutional provisions guaranteeing freedom of the press." I am not persuaded, however, that it is necessary to pass upon the constitutional issue, it being my opinion that the action to which the trial justice refers was beyond the power conferred upon the commission and, therefore, illegal.

There is in the record evidence which is concerned with the authority that the commission through its officers purported to exercise that buttresses the conclusion which I here reach. In what appears to be a circular letter dated July 19, 1957, over the signature of the executive secretary of the commission, dealers in books and publications were told: "This agency was established • • • with the immediate charge to *prevent* the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age." (italics mine) In another undated circular letter over the signature of the executive secretary of the commission, the assertion was made that certain amendatory legislation operated to "broaden the powers of this Commission, giving us broad investigative powers • • •." It is my opinion that the two examples above set out suffice to reveal that the commission or its officers substantially misconceived the purpose for which resolution No. 73 was enacted as well as the extent of the authority conferred upon the commission by the terms of that legislation.

After a thorough examination of the resolution I cannot find therein any language which either in express terms or by reasonable inference confers upon the commission or its officers authority to *prevent* the sale or distribution of any publication. The statement contained in the circular letter of July 19, 1957 constitutes an entirely unwarranted assumption that the commission was vested with power to *prevent* the sale of such publications. Neither do I find in the resolution any provision from which it may be reasonably assumed that the commission or its officers were invested with investigative powers. The language of the resolution providing that the commission make recommendations to prosecute violations of criminal statutes concerned with obscenity confers no inquisitorial power or, for that matter, any power to institute a criminal proceeding. It is my opinion that to so construe the provision referred to would be to clearly violate our well-settled rules of statutory construction.

It is my opinion then that the commission, or its officers acting in its behalf, in purporting to act pursuant to the authority conferred by resolution No. 13 has engaged in conduct that exceeded the authority in fact conferred and to that extent its action was illegal. For this reason I am constrained to dissent from the conclusion of the majority that the trial justice erred in granting the injunctive relief.

APPENDIX C

Decree of Superior Court

STATE OF RHODE ISLAND — SUPERIOR COURT
PROVIDENCE, SC.

[SAME TITLE]

This cause came on to be heard on the Petition of BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC., praying for a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956, as amended), wherein the Petitioners seek to have Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, as amended, declared unconstitutional, and wherein the Petitioners seek to have certain actions of the Respondents declared unconstitutional. After hearing thereon, arguments of counsel, and written Briefs, the following findings of fact are made:

1. The Petitioners, four New York corporations, are publishers of paper bound books, which are and have been for a long period of time distributed in the State of Rhode Island.

2. The Respondents are the present members and the Executive Secretary of the Rhode Island Commission to Encourage Morality in Youth.

3. The said Commission was created pursuant to Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, and approved

April 26, 1956. The said Resolution was amended by S. 444 of the General Assembly on May 25, 1959.

4. The Respondents sent notices to various book and magazine wholesale distributors and retailers in the State of Rhode Island, some of which notices are Petitioners' Exhibits "1" to "16" inclusive.

5. The said notices informed said book and magazine wholesale distributors and retailers that the books and magazines listed therein had been reviewed by the Commission, and that by majority vote the Commission had declared them to be objectionable for sale, distribution or display for youths under eighteen years of age.

6. Petitioners' Exhibit "6" is such a notice sent by Respondents with reference to "PEYTON PLACE", a paper bound book published by Petitioner Dell Publishing Company, Inc., and Petitioners' Exhibit "14" is a similar notice with reference to "THE BRAMBLE BUSH", a paper bound book published by Petitioner Bantam Books, Inc.

7. Copies of said notices were sent by Respondents to the Chiefs of Police of the various cities and towns in the State of Rhode Island.

8. The effect of the said notices were clearly to intimidate the various book and magazine wholesale distributors and retailers and to cause them, by reason of such intimidation and threat of prosecution, (a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers.

9. The activities of the Respondents have resulted in the suppression of the sale and circulation of the books listed in said notices without any judicial determination as to whether or not they were obscene.

10. The sending of said notices by Respondents, with their implicit threat of criminal prosecution, is a clear violation of the constitutional provisions guaranteeing freedom of the press, as set forth in Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article 1, Section 20, of the Constitution of Rhode Island.

11. Though there is considerable doubt as to the constitutionality of Resolution No. 73, as amended, it would be better practice to leave the matter of passing upon the constitutionality of said Resolution No. 73, as amended, to the Supreme Court, for the reasons set forth in the written Decision of this Court.

WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

1. That Resolution No. 73, as amended is constitutional.

2. That the acts of the Respondents in disseminating said notices concerning books and publications are hereby declared unconstitutional.

3. That Respondents, and each of them, their agents, servants, and employees, and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, dis-

tribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances.

Entered as the Decree of this Court this day of , A.D., 1961.

Enter:

/s/ MACKENZIE, J.
3/2/61

Per Order:

/s/ THOMAS A. PALANGIO, Asst. Clerk
3/3/61

Assented to: as to form:

/s/ J. Joseph Nugent, Attorney General

/s/ Joseph L. Breen
Attorneys for Respondents

/s/ Abedon, Michaelson and Stanzler
Attorneys for Petitioners

APPENDIX D

Final Decree of Superior Court Pursuant to Remand by Supreme Court of Rhode Island

STATE OF RHODE ISLAND — SUPERIOR COURT
PROVIDENCE, SC.

[SAME TITLE]

This cause came on to be heard on the Petition of BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC., praying for a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, 1956, as amended), wherein the petitioners seek to have Resolution No. 73, adopted at the January, 1956, Session of the Rhode Island General Assembly, as amended, declared unconstitutional, and wherein the petitioners seek to have certain actions of the respondents declared unconstitutional.

WHEREAS on the 2nd day of March, A. D., 1961 a Decree was entered herein ordering, adjudging and decreeing:

1. That Resolution No. 73, as amended, is constitutional.

2. That the acts of the respondents in disseminating the notices referred to in said decree concerning books and publications are hereby declared unconstitutional.

3. That respondents, and each of them, their agents, servants and employees, and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them,

either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in such Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances, and

WHEREAS the petitioners appealed to the Supreme Court of the State of Rhode Island from order No. 1 of said decree and the respondents appealed thereto from orders Nos. 2 and 3 thereof, and

WHEREAS the said Supreme Court of Rhode Island by its decision upon said appeals directed that the petitioners' appeal be denied and dismissed and that the respondents' appeal be sustained in part to the extent of reversing orders Nos. 2 and 3 and otherwise affirming said decree and remanding the cause to this Court for further proceedings,

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

1. That Resolution No. 73, as amended, is constitutional.

2. That the acts of the respondents in disseminating the notices concerning books and publications distributed in the State of Rhode Island referred to in the decree appealed from are hereby declared constitutional.

Entered as a Decree of this Honorable Court this 18th day of January, A. D., 1962.

Enter:

/s/ MACKENZIE
1-18-62

Per Order:

/s/ THOMAS A. PALANGIO
Ass't. Clerk

APPENDIX E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 555 684

RANDOM HOUSE, INC., a New York corporation,

Plaintiff,

vs.

CITY OF DETROIT, a Municipal corporation, CITY OF DETROIT METROPOLITAN POLICE DEPARTMENT, EDWARD S. PIGGINS and MELVILLE E. BULLACH,

Defendants.

OPINION

This action is brought by plaintiff for a permanent injunction (1) directing defendants to withdraw the ban against the sale in Detroit of the hard-bound edition of the book TEN NORTH FREDERICK; (2) enjoining defendants, their agents and subordinates, from directly or indirectly ordering any person engaged in the sale of the book to discontinue sale thereof, and from making any threat of prosecution, explicit or implicit, to any person selling the book by reason of their sale, distribution or display for sale thereof; the aforesaid relief, however, not to impose any restraint upon defendants' lawful duties of law enforcement by prosecution.

The matter is before the Court on an application for a preliminary injunction.

Appendix F

There is no dispute as to the facts. Plaintiff, a New York corporation, in 1955 published the hard-bound edition of the book TEN NORTH FREDERICK. The book was awarded the National Book Award as being the outstanding novel of 1955 and was on the national best seller lists for 32 weeks. Plaintiff has sold in excess of 100,000 copies of the book throughout the United States.

Defendant Piggins is the Chief of Police of the City of Detroit, and defendant Bullach is an Inspector and Head of the Censor Bureau of said Police Department. In or about the middle of January, 1957 defendant Piggins made a public announcement to the effect that the book TEN NORTH FREDERICK was obscene and thereafter defendant Bullach notified booksellers in the City of Detroit that the sale of the book would lead to arrest and prosecution. Since then the book has not been sold by booksellers in the City of Detroit.

Plaintiff contends that the foregoing acts on the part of defendants Piggins and Bullach were in excess of the authority conferred upon them by law and constituted an illegal banning and suppression of the book TEN NORTH FREDERICK, as a result of which plaintiff has been irreparably injured in violation of its constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. Defendants, on the other hand, contend that they acted within the statutory powers conferred upon them by the Michigan state statute and the Detroit municipal ordinance, both prohibiting the sale of obscene publications.

This Court is constrained to disagree with the defendants' position. We are here dealing with the precious constitutional right of a free press.

"Freedom of the press is not limited to freedom to publish, but includes the liberty to circulate publications, which the Supreme Court has said 'is as essential to that freedom as liberty of publishing.' Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 669, 82 L. Ed. 949. In the Lovell case the court again stressed the importance of protecting freedom of the press 'from every sort of infringement'. See also Near v. State of Minnesota, 283 U. S. 697, 61 S. Ct. 625, 75 L. Ed. 233, 56 S. Ct. 444, 80 L. Ed. 660; De Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278. Freedom of the press, together with freedom of speech and freedom of religion, occupy a 'preferred position' among our constitutional guaranties. Marsh v. State of Alabama, 1946, 326 U. S. 501, 509, 66 S. Ct. 276, 90 L. Ed. 265; Jones v. City of Opelika, 1943, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290; Murdock v. Com. of Pennsylvania, 1943, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292; Martin v. City of Struthers, 1943, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313. That preferred position gives these guaranties 'a sanctity and a sanction not permitting dubious intrusions.' Thomas v. Collins, 323 U. S. 516, at page 530, 65 S. Ct. 315, 89 L. Ed. 430. * * * Censorship in any form is an assault upon freedom of the press. A censorship that suppresses books in circulation is an infringement of that freedom." (*New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 832, 833; U. S. Dist. Ct., N.D. Ohio, E. D. 1953)

Neither the Michigan statute nor the Detroit municipal ordinance, under which defendants have claimed to act, clothed defendant Piggins, as Police Chief of the City of Detroit, or defendant Ballach, as Head of the Censor Bureau, with power to censor or ban the sale of any books.

Appendix E

The sole authority granted to defendants Piggins and Bullach under the Michigan statute or the Detroit ordinance is to order the arrest of any person selling a book where there is probable cause that such sale violates the obscenity laws. In the event of such an arrest, it would then devolve upon a court of competent jurisdiction to determine whether or not the book violates the obscenity statute or ordinance, thus guaranteeing a judicial determination in accordance with the constitutional requirements of due process. If, after such a judicial determination, the book were found to be obscene, a legal ban on its sale would then ensue. Here, however, defendants Piggins and Bullach have circumvented the judicial process and have effected such ban upon the sale of the book by their non-judicial determination that the book is obscene, their announcement of the fact, and their notifying booksellers that the sale of the book would lead to prosecution. Such conduct on the part of said defendants is beyond the scope of their lawful authority and violates plaintiff's constitutional rights under the First and Fourteenth Amendments to the constitution of the United States.

In a similar situation (*New American Library* v. *Allen*, supra, pp. 833, 834) the United States District Court of Ohio issued an injunction against the Police Chief of the City of Youngstown. The Court there said.

> "The defendant was without authority to censor books. Such a drastic power can be vested in a police officer only by a valid express legislative grant. As Chief of Police it was defendant's duty to examine the suspected publications to determine whether there was probable cause for prosecution. He was without authority to determine with finality

> whether the books were obscene or immoral in violation of the ordinance. In the event prosecutions were undertaken, the burden would rest upon the city officials to establish by proof beyond a reasonable doubt every element of the offense, including the obscene or immoral nature of the books. Until a court of competent jurisdiction adjudged a book to be obscene or immoral, there would exist no warrant in law for its suppression."

In *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479, Federal Judge Westenhaver issued an injunction against the Mayor and Chief of Police of Cleveland who were acting under color of an ordinance proscribing the sale of obscene and scandalous literature. Judge Westenhaver there said (p. 482):

> "The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene or scandalous; but, if it were, the limit of the city's power would be to conduct the prosecution for the specific offense thus committed. * * *."

See, also *Bantam Books, Inc. v. Melko*, 25 N.J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N.J. 524, 103 A. 2d 256.

Nor can defendants Piggins or Bullach successfully argue that their conduct did not constitute a banning of the book. The fact remains that after these defendants made their announcement that the book is obscene and notified booksellers that its sale would subject a seller to prosecution, booksellers in Detroit stopped selling the book. To say that such stoppage of sale, in the light of defendants' announcement and notification, was a *voluntary* act on the part of booksellers is to fly in the face of realism.

Like arguments have been struck down by the courts. In *Bantam Books, Inc.* v. *Melko*, supra, the Court said:

> "Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive * * *. True, as the prosecutor says by way of defense, there was no actual compulsion or threat in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received.

Similarly, in *American Mercury, Inc.* v. *Chase*, 13 F. 2d, 224, 225, the Court said:

> "Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Defendants have urged as an additional defense to this motion that the book TEN NORTH FREDERICK is obscene. The question of the obscenity or non-obscenity of the book

is not involved in this case. Plaintiff's right to an injunction does not depend upon the contents of the book. Plaintiff's right stems from the fact that these defendants have illegally banned the sale of plaintiff's book by exercising powers beyond those delegated to them by the statute and ordinance under which they acted.

It is fundamental that equity will intervene to prevent an official from transcending his power where, in so doing, he causes or threatens to cause irreparable injury to property or civil rights.

This principle was forcibly expressed by Federal Judge McNamee in *New American Library* v. *Allen*, 114 F. Supp. 823, 831 (U. S. Dist. Ct., N. D. Ohio, E. D. 1953), as follows:

> "Where public officers charged with the enforcement of a valid criminal law exceed their lawful powers and by arbitrary action cause or threaten to cause irreparable injury to property rights or civil rights of the complainant, equity will intervene. 28 Am. Jr. 373, Sec. 185; id. 421, Sec. 238; 43 C.J.S., Injunctions, Sec. 111, p. 634."

See also:

Wetherby v. *City of Jackson*, 264 Mich. 146, 249 N. W. 484, 485.

Grosse Pointe Fire Fighters Ass'n v. *Village of Grosse Pointe Park*, 303 Mich. 405, 6 N. W. 2d 725, 727.

Bantam Books, Inc. v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N. J. 524, 102 A. 2d 256.

Dearborn Pub. Co. v. *Fitzgerald*, 271 Fed. 479

Appendix E

Plaintiff has been deprived of a property right without due process of law. It has suffered loss incapable of accurate measurement in an action at law. Accordingly, plaintiff has sustained irreparable injury and is threatened with further loss.

For the reasons above set forth, the Court holds that the conduct of defendants Piggins and Bulkach in ordering the suppression of plaintiff's book under threat of arrest and prosecution of the booksellers was in excess of their lawful powers under the Michigan statute and the Detroit ordinance. An order may be entered herein restraining the defendants, pending the trial of this action, from engaging in such unauthorized conduct. No restraint, however, is imposed upon defendants' power to enforce the statute of the State of Michigan or the ordinance of the City of Detroit by prosecution.

s CARL M. WEIDEMAN
Circuit Judge

Mar. 29, 1957

A True Copy

EDGAR M. BRANIGIN
Clerk